

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

MICHAEL J. McALLISTER	:	
	:	
v.	:	
	:	CIVIL ACTION
JACK'S MARINA SOUTH, d/b/a	:	
JACK'S MARINA, INC.,	:	NO. 99-1255
JACK LYONS, d/b/a	:	
JACK'S MARINA, INC.,	:	
FRED SWAIN and	:	
HARVEY CARR	:	

MEMORANDUM ORDER

Plaintiff alleges that defendants sold him a boat for \$41,000 which he has been unable to register because of an outstanding lien in an unspecified amount. Plaintiff alleges that he contracted for the purchase of a boat with free and clear title, and that defendants misrepresented that the payment of \$41,000 would result in such a conveyance. Plaintiff alleges that defendants failed to satisfy the outstanding lien from the \$41,000 paid.

Defendants are located in Florida. Plaintiff alleges that he tendered a check for \$41,000 to the account of defendant Jack's Marina South d/b/a Jack's Marina, Inc. It appears from the copy of the actual sales agreement appended to the complaint that the boat was purchased in Bucks County, Pennsylvania from "Jack's Neshaminy Marina" and "Jack's Marine." It appears from the endorsement on the copy of the \$41,000 check appended to the

complaint that it was actually deposited into the account of Jack's Neshaminy Marina, Inc. The name of the payee is largely obscured by a large black mark and is undecipherable. Plaintiff has not sued Jack's Neshaminy Marina, Inc. or explained the relationship of that company to the named defendants.

Plaintiff asserted claims against defendants for breach of contract, fraud, violation of the Pennsylvania Consumer Protection Act ("CPA"), breach of a fiduciary duty and breach of a duty of good faith and fair dealing. Under each theory, plaintiff seeks damages in the amount of the \$41,000 paid for the boat. He also seeks attorney fees and punitive damages under the CPA and tort theories.

By order of October 12, 1999, the court denied plaintiff's request for the entry of judgment by default against all defendants because there was no showing that service had been properly effected under Pennsylvania, Florida or federal law. See Fed. R. Civ. P. 4(e)(1) & 4(h)(1). See also In re Tuli, 172 F.3d 707, 712 (9th Cir. 1999) (judgment entered without personal jurisdiction over parties is void); Rogers v. Hartford Life & Accident Ins. Co., 167 F.3d 933, 940 (5th Cir. 1999) (when court lacks personal jurisdiction because of improper service any default judgment is void); Dennis Garberg & Assocs. v. Pack-Tech Intern. Corp., 115 F.3d 767, 771 (10th Cir. 1997) (court obligated to ensure it has personal jurisdiction before entering

default judgment); Ayres v. Jacobs & Crumplar, P.A., 99 F.3d 565, 570 (3d Cir. 1996) (finding of personal jurisdiction is prerequisite for any default judgment). The court also noted that plaintiff's actual damages apparently were not \$41,0000 but rather the amount necessary to satisfy the lien, an amount he has never provided.

By correspondence of October 19, 1999, plaintiff's counsel has asked the court to reconsider "with regard to Jack's Marina, Inc. and its owner, Jack Lyons," as to whom he believes service was proper "since Mr. Lyons is the owner and he was served at the place of business that he owns." In fact service on both of these defendants was attempted by certified mail which was signed for by Charles Lyons, not Jack Lyons. No evidence or explanation has been provided as to the identity or capacity of Charles Lyons.

Certified mail is an acceptable method of serving process on Florida citizens in Florida under Florida law. See Fla. R. Civ. P. 1.070(i) ("defendant may accept service of process by mail"), as well as Pennsylvania law. See Pa. R. Civ. P. 403 & 404 (service by mail to party outside Commonwealth acceptable). It may thus also be sufficient under Fed. R. Civ. P. 4(e)(1) & 4(h)(1). Plaintiff, however, has only produced proof of service on Charles Lyons, who is not a named defendant and whose relationship to defendants has not been identified.

Certified mail at one's place of employment is not an acceptable method of service on an individual who does not answer the complaint or otherwise appear under federal law, see Fed. R. Civ. P. 4(e)(1) & (2), Florida law, see Fla. Stat. ch 48.031, or Pennsylvania law. See Pa. R. Civ. P. 403 & 404 (service by mail to party outside commonwealth effective if it results in return of receipt signed by the defendant or his authorized agent). See also Lowe v. Hart, 57 F.R.D. 550, 552 (M.D. Fla. 1994) (leaving copies of summons and complaint with someone at individual defendants' place of business ineffective unless individual accepting service is authorized to do so on their behalf); Stoeffler v. Castagliola, 629 So.2d 196, 197 (Fla. Dist. Ct. App. 1993) (service of process on business manager at defendant's office does not satisfy requirements for obtaining personal service on individual pursuant to § 48.031), review denied, 639 So.2d 976 (Fla. 1994); Hauser v. Schiff, 341 So.2d 531, 531 (Fla. Dist. Ct. App. 1977) (service of process at defendant's office upon a secretary does not constitute compliance with § 48.031). Plaintiff has failed to provide any explanation from which the court conscientiously can determine that any applicable law permits service of process on individuals by certified mail to their last known place of employment where the return receipt is signed by another unidentified individual.

There also has been no showing that the person who

signed for the certified mail was authorized to accept process on behalf of any corporate defendant. See Fed. R. Civ. P. 4(h)(1) (officer, managing agent, general agent or agent authorized by appointment or law to accept service); Fla. Stat. chs. 48.081, 48.091 (president, vice president or other head of corporation; or cashier, treasurer, secretary or general manager; or director; or officer or business agent residing in Florida; or registered agent authorized by appointment or by law to receive service); Pa. R. Civ. P. 424 (executive officer, partner, trustee, manager, person in charge of any regular place of business or activity of the corporation or agent authorized by the corporation in writing to receive service of process). Sections 48.081 and 48.091 provide the exclusive means of effecting service of process on an active corporation in Florida and these provisions are strictly construed. See Dade Erection Services, Inc. v. Sims Crane Service, Inc., 379 So.2d 423, 425 (Fla. Dist. Ct. App. 1980). Strict compliance with § 48.081 "requires that a return which shows service upon an inferior officer or agent must demonstrate that all members of a superior class could not first be served." Woodbury v. Sears, Roebuck & co., 152 F.R.D 229, 235 (M.D. Fla. 1993).

Counsel also refers to the court's reference to the fact that plaintiff could have obtained clear title by satisfying the lien and contends it would be "blatantly unfair" to expect

him "to pay a second amount." He misses the point. The question is not what plaintiff should pay but what he may recover. It would hardly be fair for plaintiff to recover the entire \$41,000 purchase price and effectively receive a free boat.

A court cannot enter a default judgment unless it is satisfied that it has subject matter jurisdiction. See Wisconsin Dept. Of Corrections v. Schacht, 118 S. Ct. 2047, 2054 (1998); Meritcare, Inc. v. St. Paul Mercury Ins. Co., 166 F.3d 214, 217 (3d Cir. 1999); Liberty Mutual Ins. Co. v. Ward Trucking Co., 48 F.3d 742, 750 (3d Cir. 1995); Wisconsin Knife Works v. National Metal Crafters, 781 F.2d 1280, 1282 (7th Cir. 1986).

A court is not bound by a conclusory allegation of jurisdiction. See Shimsky v. Ford Motor Co., 170 F.R.D. 125 (E.D. Pa. 1997). The amount in controversy generally is measured by a reasonable reading of the value of the right being litigated in view of the damages potentially recoverable under applicable law. See Suber v. Chrysler Corp., 104 F.2d 578, 584 (3d Cir. 1997); Angus v. Shiley, 989 F.2d 142, 146 (3d Cir. 1993). The amount in controversy requirement is narrowly construed to honor the congressional purpose of limiting the diversity caseload of the federal courts. See Packard v. Provident Nat. Bank, 994 F.2d 1039, 1044-45 (3d Cir. 1993).

The measure of damages in this case could be an amount which placed plaintiff in the position he would have been in had

the contract been performed or the difference between what plaintiff paid in reliance upon the alleged fraudulent misrepresentation and the value of what he received. See ATACS Corp. v. Trans World Communications, Inc., 155 F.3d 659, 669 (3d Cir. 1998); Killian v. McColloch, 850 F. Supp. 1239, 1252 (E.D. Pa. 1994). That amount in each instance is the amount necessary to satisfy the lien and thus obtain the boat with clear title that plaintiff contracted for and to obtain the full value of what he paid \$41,000 to receive.

Unfortunately, plaintiff nowhere provides that amount. The court must assume that if this amount were substantial, plaintiff would have presented it to substantiate subject matter jurisdiction. If the amount is relatively modest, even trebling it, which is conceivable under the CPA, and then adding the \$5,417 claimed for legal fees and costs in counsel's appended correspondence of October 6, 1999, which is recoverable under the CPA, plaintiff would not approach the jurisdictional threshold.

Unlikely though it may be, it is conceivable that a court would treble plaintiff's actual damages under the CPA in addition to an award of punitive damages on his tort claims. Even so, it appears that any such punitive damages award would have to be considerable to satisfy the jurisdictional amount. See Packard, 994 F.3d at 1046 (claim for punitive damages "should be given particularly close scrutiny" when it appears to

constitute bulk of amount in controversy).

The court does not conclude that it is inconceivable plaintiff could recover in excess of \$75,000 exclusive of interest and costs. The problem is that because plaintiff refuses to specify the liquidated amount of actual damages, the court cannot conscientiously conclude that he may conceivably recover such an amount and that it has subject matter jurisdiction to enter a judgment. See Packard, 994 F.2d at 1045 ("[t]he person asserting jurisdiction bears the burden of showing that the case is properly before the court at all stages of the litigation").

ACCORDINGLY, this day of October, 1999, IT IS HEREBY ORDERED that plaintiff's request for reconsideration is DENIED, without prejudice to renew his request for default judgment by motion with an appropriate showing that the court has personal and subject matter jurisdiction.

BY THE COURT:

JAY C. WALDMAN, J.